

In the Court of Appeal of New Zealand

CA /2019

between

RICHARD CILIANG YAN
Appellant

and

MAINZEAL PROPERTY AND CONSTRUCTION LIMITED
(IN LIQ)
First Respondent

and

KING FACADE LIMITED (PREVIOUSLY KNOWN AS
RICHINA LAND LIMITED) (IN LIQ)
Second Respondent

and

MAINZEAL GROUP LIMITED (IN LIQ)
Third Respondent

and

NOTICE OF APPEAL

21 March 2019

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ANDREW JAMES BETHELL AND BRIAN MAYO-SMITH
Fourth Respondents

and

PETER GOMM
Fifth Respondent

and

RT HON JENNIFER MARY SHIPLEY
Sixth Respondent

and

CLIVE WILLIAM CHARLES TILBY
Seventh Respondent

and

PAUL DAVID COLLINS
Eighth Respondent

and

RICHINA GLOBAL REAL ESTATE LIMITED (IN LIQ)
Ninth Respondent

and

**ISOLA VINEYARDS LIMITED (PREVIOUSLY KNOWN
AS WAIHEKE VINEYARDS LIMITED)
(IN LIQ)**
Tenth Respondent

NOTICE OF APPEAL

Richard Ciliang Yan (**Mr Yan**), the appellant in the proceeding identified above, gives notice that he is appealing to this Court against the parts of the decision of Cooke J in the High Court at Auckland ([2019] NZHC 255; CIV 2015-404-1094)), delivered 26 February 2019 (**Judgment**) finding the Mr Yan breached s135 of the Companies Act 1993 (**Act**); that such breach caused loss to the First Respondent (**Mainzeal**) being said to be the total loss to creditors in the liquidation; that Mr Yan's culpability was substantially greater than the other directors due to his conflict of interest and personal benefit; and that he be liable in the sums set out in the Judgment to Mainzeal.

GROUND OFS OF APPEAL

The High Court Undertaking Own Inquiry / Breach of Natural Justice

1. The High Court erred in finding that it could undertake its own separate inquiry under s301 of the Act, in the sense that it was independent of the plaintiffs' pleaded case, the plaintiffs' submissions, and the evidence they had adduced. In particular, after the plaintiffs had closed their case, the High Court issued Minutes dated 24 October and 2 November 2018 (**High Court's Minutes**) to the effect that if liability under s135 of the Act arose, then the High Court could make its own assessment of quantum, even if it was not on the basis contended for by the plaintiffs in their pleadings or evidence.
2. The High Court erred in subsequently making findings relevant to liability, causation and quantum under s135 that were not pleaded, not supported by evidence, and not put to Mr Yan, or Richina Pacific Limited (**RPL**)'s Chairman at the relevant time, Mr Walker, in particular, namely that:
 - (a) Mr Yan's (unidentified) breach may have occurred "*from an earlier stage*" than the Fifth to Seventh Respondents despite Mr Yan not being a director of Mainzeal between November 2004 and April 2009, and there being no pleading or finding that Mr Yan was a *de facto* director in the relevant period ([453(a)]);
 - (b) Mr Yan was culpable for the "*vulnerable trading*" policy the High Court found RPL/Mr Yan had required of Mainzeal, apparently independently of the Fifth to Seventh Respondents ([416], [417], [453(a)], [453(b)]);
 - (c) Mr Yan misled the Fifth to Seventh Respondents by the manner in which he gave assurances of support and this was a significant factor in the breaches of duties by the Fifth to Seventh Respondents ([453(c)]); and
 - (d) Had Mr Yan and the Fifth to Seventh Respondents insisted to the point of resignation, these directors would have been successful in forcing RPL/the Richina Group "*to abandon the vulnerable trading approach*" ([417] and [426]) and RPL "*would have been prepared to provide legally binding support*" ([423]-[424]).

3. These findings were unfair to Mr Yan by reason of the following:
- (a) Those findings were based on errors of fact and/or did not arise on the case pleaded by the plaintiffs;
 - (b) The theory of causation and loss raised in the High Court's Minutes was not argued or adopted by the plaintiffs at trial;
 - (c) The plaintiffs were unsuccessful in establishing the loss *as pleaded* ([393], [396]-[397], [407] [538]), because the High Court found that there was no deterioration in Mainzeal's financial position;
 - (d) The findings were made without adequate notice to Mr Yan, even if (which is denied) the High Court had power to undertake its own separate inquiry under s 301, because of the matters above and also:
 - (i) The basis for the High Court's findings on causation and quantum were not adequately identified in the High Court's Minutes;
 - (ii) The High Court's reasoning on causation and quantum was unorthodox and could not fairly have been anticipated by Mr Yan at the time of the High Court's Minutes; and
 - (e) Even if (which is denied) the High Court had power to conduct its own separate inquiry under s 301, the High Court's findings were made without Mr Yan having an adequate opportunity to be heard both as to evidence and submission.

Breach of s135

4. The High Court erred in fact and in law in finding that Mr Yan breached s 135 of the Act.
5. The plaintiffs' pleaded case and evidence in support was essentially that Mr Yan and the Fifth to Seventh Respondents collectively breached their duty under s 135 by allowing Mainzeal to continue to trade beyond the pleaded breach dates of 31 January 2011 and/or 31 July 2011 which in turn caused Mainzeal's financial position to deteriorate. On the findings in the Judgment:
- (a) There was no reason to place Mainzeal into receivership or liquidation on the January or July 2011 breach dates as pleaded ([396]-[397]); and
 - (b) There was no deterioration of Mainzeal's financial position between the 31 January 2011 breach date and liquidation in 2013 ([538]).
6. The High Court erred in finding that there was a breach of s 135 because there was no sufficient assurance of support by RPL on which Mr Yan could reasonably rely if adverse circumstances arose (at [187]), an error itself based on the following erroneous findings:

- (a) There was a conscious decision by RPL in late 2010 not to provide a written commitment of support (at [99], [211]);
- (b) RPL had procured Mr Yan's breach of s 135 by requiring Mainzeal to adopt a policy of insolvent trading whilst using creditors' funds as working capital over a number of years as its *modus operandi* (at [280], [282] and [416]);
- (c) Mr Yan had culpability, as a director of Mainzeal, for the policy of "*vulnerable trading*" that RPL was (erroneously) found to have required Mainzeal to adopt (at [453(a)] and [453(b)]);
- (d) Any such decision by RPL amounted to a conflict of interest for Mr Yan, as a director of Mainzeal, because it would not have been in his interests for RPL to provide a legally binding obligation of support for Mainzeal (at [283]);
- (e) RPL did not provide Mainzeal with significant financial support during the years 2006-2011, as generally it was the other way around (at [220], [246]);
- (f) Mr Yan could not rely on his own informal expressions of support, because such reliance became unreasonable after the group restructure in 2009 (at [226], [235], [236]); and
- (g) Mr Yan caused the infringing manner of trading prior to the Fifth to Seventh Respondents allowing it, given his role in establishing the arrangements, including two loans for other group purposes, known as the MLG Loans, at an earlier stage (at [291], [293]). In fact, Mr Yan was not a director of Mainzeal when the two loans from Mainzeal to MLG were documented in 2005 (although he was when the first advance of USD1.36m was made in late 2004 when he was a director). He became a director again in April 2009.

Loss not caused by / available as remedy for breach

- 7. The High Court erred in finding that compensation under s 301 of the Act could be assessed on the basis of the entire loss to creditors, relying on dicta from *Re South Pacific Shipping* (HC) and *Löwer v Traveller* (CA), when the reasoning in those decisions rested entirely on the express terms of s 320 of the Companies Act 1955, which included power to declare a person "*personally responsible, without any limitation of liability, for all or any part of the debts and other liabilities of the company*" (emphasis added) (at [410]-[411]). By contrast, section 301 of the Act does not include such a power and is confined to the award of compensation for the loss caused by the relevant breach of duty.
- 8. The High Court erred in conflating the loss suffered by Mainzeal flowing from the breach on the one hand and the losses suffered by creditors of Mainzeal upon liquidation, on the other.
- 9. The High Court erred in finding that Mr Yan's breach of s135 caused a total loss of \$110m to Mainzeal's creditors upon Mainzeal's liquidation, and (implicitly) finding that this was sufficient to establish that Mr Yan's breach caused a \$110m loss to *Mainzeal* (at [455]). In particular:

- (a) The total quantum of admitted creditor claims of \$110m in Mainzeal's liquidation (including other companies) did not flow from a breach of duty as found by the High Court that occurred in either mid-2010 or January/July 2011 ([291]-[293]);
 - (b) The figure of \$110m was not a "deficiency" as found by the High Court, rather it was a sum derived in the Judgment from the total admitted claims of creditors of Mainzeal and several other companies, whose liquidations were pooled under s 271 of the Act. The High Court also failed to have regard to the assets at the time of liquidation and recovery ordered against the Tenth Respondent in arriving at that figure as a "deficiency" [427];
 - (c) The directors' actions at the time of the breach as found by the High Court did not cause the losses suffered by creditors;
 - (d) The directors could not force RPL to capitalise Mainzeal or to give a legally enforceable undertaking to pay intercompany loans to Mainzeal owed by other group companies. Even if they had obtained an undertaking, it would not have prevented Mainzeal from being placed into liquidation;
 - (e) There was no pleading or evidence, or testing of relevant witnesses, to support the findings in [417]-[426] to the effect that the directors could have successfully procured the group to "*abandon the vulnerable trading approach*";
 - (f) A threat by Mr Yan and the Fifth to Seventh Respondents to resign would simply have caused an earlier liquidation and thus greater losses for creditors; and
 - (g) The undisputed evidence was that RPL could never capitalise Mainzeal or provide further funding than it was otherwise providing:
 - (i) RPL could not complete the 2008/2009 restructuring because of the relevant third party investor withdrawing its support in early 2009;
 - (ii) RPL had a provisional liquidator appointed in March 2013 by reason of its inability to meet bond liabilities of approximately \$19m and thus was never in a position to commit to further funding;
 - (iii) RPL's bond exposure was substantially greater in 2011 than it was in 2013; and
 - (iv) The ability to procure funds from China for the benefit of Mainzeal was exhausted by 2013.
10. The High Court erred in finding that Mr Yan's breach of s 135 should nonetheless be regarded as the cause of an entire "loss" of \$110m, as a matter of law (at [439]), despite finding that Mainzeal's failure and the extent of its losses may have been contributed to by factors other than a breach of s 135 of the Act by Mr Yan.

11. The High Court erred in finding that, had RPL been legally committed to support Mainzeal, then Mainzeal's failure would have been avoided altogether (at [400]), despite having found that:
- (a) Even if legally binding support for Mainzeal had been provided by RPL, RPL may have been prevented from providing such support when called upon due to the limitations imposed by Chinese law (at [216]); and
 - (b) When faced with \$19m of construction bond liabilities arising from Mainzeal's failure in 2013, RPL was forced to appoint a provisional liquidator for the remainder of 2013, due to RPL's lack of liquid assets and Chinese foreign currency exchange laws preventing payment by RPL (at [147]).

Culpability

12. The High Court erred in finding that Mr Yan was more culpable than the Fifth to Seventh Respondents, because of the following erroneous findings in particular:
- (a) Mr Yan's breach may have occurred from an earlier stage than that of the Fifth to Seventh Respondents. This finding appears to be in substance that either:
 - (i) Mr Yan caused the original loans from Mainzeal to MLG (the terms of which were documented in 2005 when Mr Yan was not a director of Mainzeal, so the finding is wrong in fact); or
 - (ii) Mr Yan is personally liable as a (later) director of Mainzeal, for the actions of RPL (which is wrong in law as it conflates Mr Yan's acts as a director with those of RPL and wrong in fact because Mr Yan was only one of the investors in RPL (see [38]));(at [453(a)]);
 - (b) Mr Yan was in a conflict of interest position given his shareholding in RPL. On this finding any director who has ability to contribute or procure the contribution of funds to a balance sheet insolvent company will be culpable and have acted in conflict of interest for not doing so (at [453(b)]);
 - (c) Mr Yan misled the Fifth to Seventh Respondents by exaggerating the support that was being provided and assuring them that there was no reason to worry (at [453(c)]), despite finding (at [309]) that it would not have been apparent to any of the directors (including Mr Yan) that Mainzeal's failure would occur until very near to the point where Mainzeal actually failed;
 - (d) Mr Yan benefited very substantially from using Mainzeal's funds to assist in acquiring assets in China. This amounts to a finding that Mr Yan is culpable as a director of Mainzeal due to loans the terms

of which were agreed to when he was not a director of Mainzeal and conflates Mr Yan's position with that of RPL; and

- (e) The extent of the amount that Mr Yan is required to contribute "*is materially less than the value extracted from Mainzeal to assist in acquiring this wealth*" (at [453(e)]). In fact, the contribution ordered against the Fifth to Seventh Respondents (total \$18m, \$6m each) and Mr Yan (the total \$36m) is significantly more than the principal of the MLG Loans as originally advanced (approximately \$15m).
13. The High Court erred in exercising the discretion in s 301, including by failing to have sufficient regard to:
- (a) The finding that there had been no net deterioration in Mainzeal's position;
 - (b) Mr Yan's honesty and commitment to Mainzeal;
 - (c) The short duration of the period when Mainzeal's future as a going concern was in question;
 - (d) The absence of causation between Mr Yan's conduct as a director as found and the company's losses; and
 - (e) The other causes of the failure of Mainzeal.

JUDGMENT SOUGHT

14. The Appellant seeks the following relief:
- (a) The High Court's findings under s 301 of the Act as to breach of s135, causation of loss and contribution by Mr Yan be set aside;
 - (b) Costs of this appeal be awarded to the Appellant and any costs in the High Court determined based on the High Court's judgment against Mr Yan be set aside;
 - (c) Such other orders as the Court sees fit.
15. The Appellant is not legally aided.

Dated 21 March 2019



Tim Mullins
Solicitor for the Appellant

This document is filed by Tim Mullins solicitor for the Appellant of the firm LeeSalmonLong.

Documents for the Appellant may be served at the offices of LeeSalmonLong situated on Level 16, Vero Centre, 48 Shortland Street, Auckland, or may be posted to P O Box 2026, Shortland Street, Auckland.